1990

Town of Manilla v. Broadbent Land Company : Amicus Brief

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

TOWN OF MANILA Plaintiff and Respondent vs. BROADBENT LAND COMPANY Defendant and Appellant.	:	AMICUS CURIAE BRIEF Case No. 900007

Interlocutory Appeal Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure from Findings, Judgments and Orders of the Eighth Judicial District Court in and for Daggett County.

Honorable Dennis L. Draney,
District Judge

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LIST OF PARTIES

A. Designation of Plaintiff and Respondent.

The Plaintiff and Respondent is the Town of Manila.

B. Designation of Defendant and Appellant.

The Defendant and Appellant is Broadbent Land Company.

C. Designation of Amicus Curiae

The Amicus Curiae is the Utah League of Cities & Towns

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTION

This Court has jurisdiction to hear this appeal based on Article VIII of the Constitution of the State of Utah; Utah Code Ann., §78-2-2(3)(j) (Repl. Vol. 9, 1987); Rule 54(b) of the Utah Rules of Civil Procedure, certifying the rulings and orders as final and appealable; and Rules 3 and 4 of the Rules of the Utah Supreme Court.

SUMMARY OF ARGUMENT

Appellants have misconstrued Article XI, §5, of the Utah Constitution as limiting a town's power to condemn property. Apellants fail to realize that the Legislature can delegate its power of eminent domain to towns if it wishes, without regard to what Article XI, §5 of the Utah Constitution states, and that the Legislature has, in fact, made the appropriate delegations.

ARGUMENT

Point I

UTAH TOWNS HAVE THE POWER OF CONDEMNATION

Appellant has argued through a series of suppositions and logic jumps that towns in Utah can not be delegated the power to take property by eminent domain. This conclusion is not an accurate statement of the current law in Utah. Appellant bases its argument on Article XI, §5 of the Utah Constitution. This Section reads as follows:

> Corporations for municipal purposes shall not be created by special laws. The legislature by general laws shall provide for the incorporation, organization and classification of cities and towns in proportion to population, which laws may be altered, amended or repealed. Any incorporated city or town may frame and adopt a charter for its own government in the following manner:
>
> The legislative authority of the city may, by two-thirds vote of its members, and upon petition of qualified electors to the number of fifteen per cent of all votes cast at the next preceding election for the office of the mayor, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election. The ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation. Such candidates shall be nominated in the same manner as required by law for nomination of city officers. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving a majority of the votes cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.

Any charter so framed shall be submitted to the qualified electors of the city at an election to be held at a time to be determined by the charter commission, which shall be not less than sixty days subsequent to its completion and distribution among the electors and not more than one year from such date. Alternative provisions may also be submitted to be voted upon separately. The commission shall make provisions for the distribution of copies of the proposed charter and of any alternative provisions to the qualified electors of the city, not less than sixty days before the election at which it is voted upon. Such proposed charter and such alternative provisions as are approved by a majority of the electors voting thereon, shall become an organic law of such city at such time as may be fixed therein, and shall supersede any existing charter and all laws affecting the organization and government of such city which are now in conflict therewith. Within thirty days after its approval a copy of such charter as adopted, certified by the mayor and city recorder and authenticated by the seal of such city, shall be made in duplicate and deposited, one in the office of the Secretary of State and the other in the office of the city recorder, and thereafter all courts shall take judicial notice of such charter.

Amendments to any such charter may be framed and submitted by a charter commission in the same manner as provided for making of charters, or may be proposed by the legislative authority of the city upon a two-thirds vote thereof, or by petition of qualified electors to a number equal to fifteen per cent of the total votes cast for mayor on the next preceding election, and any such amendment maybe submitted at the next regular municipal election, and having been approved by the majority of the electors voting thereon, shall become part of the charter at the time fixed in such amendment and shall be certified and filed as provided in case of charters.

Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law, and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not include the power to regulate public utilities, not municipally owned, if any such regulation of public

utilities is provided for by general low, nor be deemed to limit or restrict the power of the legislature in matters relating to State affairs, to enact general laws applicable alike to all cities of the State.

The power to be conferred upon cities by this section shall include the following:

(a) To levy, assess and collect taxes and borrow money, within the limits proscribed by general law, and to levy and collect special assessments for benefits conferred.

(b) To furnish all public services, to purchase, hire, construct, own, maintain or operate, or lease, public utilities local and extent in use; to acquire by condemnation or otherwise, within or without the corporate limits, property necessary for such purposes, subject to the restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

(c) To make local public improvements and to acquire by condemnation or otherwise property within its corporate limits necessary for such improvements; and also to acquired an excess over that needed for any such improvement and to sell or lease such excess property with restrictions in order to protect and preserve the improvement.

(d) To issue and sell bonds on the security of any such excess property, or of any public utility owned by the city, or of the revenues thereof, or both, including, in the case of public utility, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility. (As amended November 8, 1932, effective January 1, 1933)

Since the word "town" is not used in the phrase "the power to be conferred upon cities by this Section," Appellant supposes that the provision prohibits the legislature from delegating the power of eminent domain to towns. This is an absurd conclusion.

In 1931 the legislature, by joint resolution, proposed an amendment to Article XI, §5, of the Utah Constitution adding all of the language following the second sentence of

the first paragraph (Laws of Utah, 1831, pg. 290). As can be seen from the Amendment, the bulk of the provisions dealt with a city's or town's authority to adopt a charter.

Soon after the Amendment was effective, the Utah Supreme Court was required to interpret this Amendment in the case of Wadsworth et al. v. Santaquin City et al. 83 Utah 321, 28 P.2d 161 (Utah 1933). While the specific question before the Court was whether Santaquin City could issue Revenue Bonds, the issue before the Court was whether or not the enumerated powers contained in paragraphs (a), (b), (c) and (d) of the Amended Article XI, Section 5 were a grant of power only to the cities which adopt charters pursuant to the new Amendment, or whether the powers could be utilized by non-charter cities.

The Court stated:

> The power granted in the amendment to cities forming their own charters, while taking such cities out of the orbit of legislative action as to municipal and local affairs, is no limitation on the power of the Legislature with respect to the organization of other cities and the conferring of power on them by general law. We think the enumeration of the power to borrow money on the security of a utility or its income, or both, was intended by the people in adopting the constitutional amendment to place such power within the scope of municipal action, and was clearly intended to be available to chartered cities in forming their charters, and in addition thereto, by use of the language, "power to be conferred upon the cities by this section," just as clearly was intended to enumerate a power which the Legislature might, if it chose, confer on cities depending on general law for their organization and authority. It is an expression by the people of the scope of municipal action when permitted by an legislative enactment or included in

any charter adopted by the people of a city. Wadsworth et al., Supra, at 340 and 341.(emphasis added)

Thus this Constitutional provision is not written, as assumed by Appellant, as a limitation on the powers of cities or towns, but rather is a limitation on the power of the Legislature. The correct reading of this Constitutional provision is that the Legislature must allow for the adoption of a charter by any city or town, and the Legislature may also delegate the listed powers to non-chartered cities. There is no language in this Constitutional provision nor cases cited by Appellant which can reasonably lead to the conclusion that Article XI, §5, of the Utah Constitution limits the power of towns, or prevents the Legislature from delegating its power to towns.

The power of eminent domain has been described as:

> An inherent attribute of the sovereignty of the State, to take or authorize the taking of any private property within its jurisdiction for public use to promote the general welfare, without the consent of the owner, upon payment of just compensation therefore, according to the method prescribed by law.
>
> The power is essentially legislative, unrestricted, and does not emanate from constitution or statute, but is merely limited thereby. Or, as otherwise expressed: It is older than the Constitutions, it requires no Constitutional recognition, it is not created or granted by Constitution or statute, and is without restriction, except as the people have limited it by organic inhibition, namely, that the taking must be for public use and that compensation must be made. McQuillin Mun Corp (3rd Ed) §32.02

The Legislature has the right and power to delegate its power of eminent domain to municipal corporations such as towns and in Utah the Legislature has made such a delegation. Utah Code, §78-34-1(9) (1953 as amended) specifically provides that the power of eminent domain may be exercised in behalf of incorporated towns for sewerage systems.

Point II

THE POWER OF EMINENT DOMAIN EXTENDS BEYOND TOWNS CORPORATE BOUNDARIES

Appellant has relied on the case of Bertagnoli et al. vs. Baker et al. 117 Utah 348, 215 P.2d 626 (Utah 1950), for the proposition that towns cannot condemn property beyond their corporate boundaries. This case should not be read to stand for this proposition.

As Appellant's Brief properly points out, the issue in Bertagnoli was whether or not the Board of Education of Salt Lake City had been given authority by the legislature to condemn land outside its School District Boundaries. The Court reason that the Boards of Education have:

> Only such powers as expressly conferred upon them and such implied powers as are necessary to execute and

carry into effect their express powers. Bertagnoli, Supra, at page 351

The Bertagnoli Court found that there was no express statutory authority for using the power of eminent domain outside the School District boundaries and then considered whether such power must be implied from other powers expressly given to school boards. The Bertagnoli Court, in examining cases cited in favor of extra territorial powers, compared the School Board's power to build schools with the power to maintain water works and sewerage systems. The Court then reasoned that if an entity was given express powers to condemn for purposes such as water systems and sewers, the authority to exercise this power outside the territorial boundaries of the entity could be implied if the extra territorial power was necessary to carry into effect the express power to build water and sewer systems.

The Bertagnoli Court held that the extra territorial power of eminent domain could not be implied from any statutory grant of power to the School Board to build or operate schools within the boundaries of their district.

This case, obviously, does not support the position that towns do not have extra territorial powers of condemnation. It should be read to support the position that towns must, in fact, have extra territorial powers of condemnation. Towns have been given the power to maintain

sewer systems (See Utah Code Annotated §10-8-38 (1953)). Sewer systems, much of the time, extend beyond town corporate limits. If the town could not condemn property outside its boundaries, the power to build and maintain sewer systems would be seriously impaired.

The proper analysis of this issue is as argued in Point I of this brief. Article XI, §5 of the Utah Constitution does not limit the power of towns or cities. The question is, has the Legislature expressly or implicitly delegated the power to condemn property within or without the territorial boundaries of towns.

CONCLUSION

Appellants rely on Article XI, Section 5, of the Utah Constitution for the proposition that towns either do not have the power of condemnation, or if they do have the power of condemnation, they do not have the power to condemn sewer systems outside the corporate limits. There is no basis for this conclusion. Article XI, §5, of the Utah Constitution, is a grant of authority to cities and towns, not a limitation of their power. Any limiting language in the Article is language which limits the power of the Legislature. The legislature of Utah has clearly delegated expressly and implicitly, to towns the power to construct and maintain sewage systems and the power to condemn property within and without their territories for that purpose.

DATED this 10th day of May, 1990.

DAVID L. CHURCH
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Cities & Towns

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Amicus Curiae Brief, postage prepaid, this 14th day of May, 1990, to the following:

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APPENDIX

INDEX TO APENDIX

UTAH CODE ANN., §10-8-38

COLLATERAL REFERENCES

Am. Jur 2d. — 65 Am Jur 2d Railroads § 201 et seq
C.J.S. — 74 C J S Railroads §§ 158, 187, 433, 83 C J S Street Railroads § 170

Key Numbers. — Railroads ⇐ 98, 107, 108, 243, Street Railroads ⇐ 76

10-8-37. Construction, repair and maintenance of bridges, viaducts and tunnels — Retainage escrow.

(1) They may construct and keep in repair bridges, viaducts and tunnels, and regulate the use thereof

(2) If any payment on a contract with a private person, firm, or corporation to construct bridges, viaducts, or tunnels is retained or withheld, it shall be placed in an interest bearing account and the interest shall accrue for the benefit of the contractor and subcontractors to be paid after the project is completed and accepted by the board of commissioners or city council of the city It is the responsibility of the contractor to ensure that any interest accrued on the retainage is distributed by the contractor to subcontractors on a pro rata basis

History: R S. 1898 & C.L. 1907, § 206, subd. 36; L. 1911, ch 120, § 1, 1915, ch. 100, § 1; C.L. 1917, § 570x36; R S 1933 & C 1943, 15-8-37; L 1983, ch. 60, § 5
Amendment Notes — The 1983 amendment added Subsection (2)

Compiler's Notes. — "They," as used at the beginning of Subsection (1), refers to boards of commissioners and city councils of cities See § 10 8-1

NOTES TO DECISIONS

Maintenance.
City which assumed control and ownership of bridge was legally bound to use ordinary diligence to keep it in a reasonably safe condition Mackay v Salt Lake City, 29 Utah 247, 81 P 81 (1905)

COLLATERAL REFERENCES

Am. Jur. 2d. — 39 Am Jur 2d Highways, Streets, and Bridges §§ 81 to 83
C J S. — 63 C J S Municipal Corporations § 1044

Key Numbers. — Municipal Corporations ⇐ 269(2)

10-8-38. Drainage and sewage systems — Construction, regulation and control — Retainage escrow — Mandatory hookup — Charges for use — Collection of charges — Service to tenants — Failure to pay for service — Service outside municipality.

(1) Boards of commissioners, city councils and boards of trustees of cities and towns may construct, reconstruct, maintain and operate, sewer systems, sewage treatment plants, culverts, drains, sewers, catch basins, manholes, cesspools and all systems, equipment and facilities necessary to the proper drainage, sewage and sanitary sewage disposal requirements of the city or town and regulate the construction and use thereof

If any payment on a contract with a private person, firm, or corporation to construct or reconstruct sewer systems, sewage treatment plants, culverts, drains, sewers, catch basins, manholes, cesspools, and other drainage and sewage systems is retained or withheld, it shall be placed in an interest bearing account and the interest shall accrue for the benefit of the contractor and subcontractors to be paid after the project is completed and accepted by the board of commissioners or city council of the city, or the board of trustees of the town. It is the responsibility of the contractor to ensure that any interest accrued on the retainage is distributed by the contractor to subcontractors on a pro rata basis.

(2) Any city or town may, for the purpose of defraying the cost of construction, reconstruction, maintenance or operation of any sewer system or sewage treatment plant, provide for mandatory hookup where the sewer is available and within 300 feet of any property line with any building used for human occupancy and make a reasonable charge for the use thereof. In order to enforce the mandatory hookup to the sewer where available and the collection of any such charge, any city or town operating a waterworks system may make one charge for the combined use of water and the services of the sewer system, including the services of any sewage treatment plant operated by the city or town and may provide by ordinance that application for service from such combined system shall be made in writing, signed by the owner desiring such service or his authorized agent, in which application such owner shall agree that he will pay for all service furnished such owner according to the rules and regulations enacted in the ordinance of such city or town.

In case an application for furnishing service from such combined systems shall be made by a tenant of the owner, such city or town may require as a condition of granting the same that such application contain an agreement signed by the owner or his duly authorized agent to the effect that in consideration of granting such application the owner will pay for all service furnished such tenant or any other occupant of the premises named in the application in case such tenant or occupant shall fail to pay for the same according to the ordinance of such city or town.

In case any person shall fail to hookup to the sewer where available and in case any applicant shall fail to pay for the service furnished according to the rules and regulations prescribed by the ordinances of such city or town, then the city or town may cause the water to be shut off from such premises and shall not be required to turn the same on again until such person has hooked up to the sewer at his own expense or all arrears for service furnished shall be paid in full.

Cities and towns may sell and deliver from the surplus capacity thereof, services of any such system or facility not required by the municipality or its inhabitants to others beyond the limits of the municipality.

History: R.S. 1898 & C.L. 1907, § 206, subd. 37; L. 1911, ch. 120, § 1; 1915, ch. 100, § 1; C.L. 1917, § 570x37; R.S. 1933 & C. 1943, 15-8-38; L. 1947, ch. 18, § 1; 1969, ch. 29, § 1; 1971, ch. 12, § 1; 1983, ch. 60, § 6.

Amendment Notes — The 1983 amendment added the second paragraph of Subsection (1) and inserted the subsection designations.

Cross-References. — Joint use of sewage systems by public owners, contracts, § 11-8-1.

Solid Waste Management Act, § 26-32-1 et seq.

Water and sewers, powers as to, §§ 10-7-4 to 10-7-14.3

UTAH CODE ANN., §78-2-2(3)(j)

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the Board of State Lands and Forestry;

(iv) the Board of Oil, Gas, and Mining; or

(v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

UTAH CODE, §78-34-1(9)

78-33-13. "Person" defined.

The word "person" wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-33-13.

Cross-References. — Corporations, Title 16.
Partnerships, Title 48.

COLLATERAL REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d Declaratory Judgments § 79.
C.J.S. — 26 C.J.S. Declaratory Judgments § 117 et seq.

Key Numbers. — Declaratory Judgment ⇐ 291.

CHAPTER 34
EMINENT DOMAIN

78-34-1. Uses for which right may be exercised.

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

(1) all public uses authorized by the Government of the United States.

(2) public buildings and grounds for the use of the state, and all other public uses authorized by the Legislature.

(3) public buildings and grounds for the use of any county, city or incorporated town, or board of education; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city or incorporated town, or for the draining of any

county, city or incorporated town; the raising of the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys; and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.

(4) wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.

(5) reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for irrigation purposes, or for the draining and reclaiming of lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation ponds and other facilities for the recovery of minerals in solution.

(6) roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines, quarries, coal mines or mineral deposits including minerals in solution; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal mines or mineral deposits including minerals in solution; mill dams; gas, oil or coal pipelines, tanks or reservoirs, including any subsurface stratum or formation in any land for the underground storage of natural gas, and in connection therewith such other interests in property as may be required adequately to examine, prepare, maintain, and operate such underground natural gas storage facilities; and solar evaporation ponds and other facilities for the recovery of minerals in solution; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter.

(7) byroads leading from highways to residences and farms.

(8) telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

(9) sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

(10) canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat.

(11) cemeteries and public parks.

(12) pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar.

(13) sites for mills, smelters or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes and dust therefrom, produced by the operation of such works; provided, that the powers granted by this subdivision shall not be exercised in any county where the population exceeds twenty thousand, or within one mile of the limits of any city or incorporated town; nor unless the proposed

UTAH RULES OF CIVIL PROCEDURE

Rule 54(b)

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

RULES OF THE UTAH SUPREME COURT

Rule 3(a)

Rule 3. Appeal as of right: How taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district court to the Supreme Court from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney's fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in an appeal of another party after filing separate timely notices of appeal. Such joint appeals may thereafter proceed and be treated as a single appeal with a single appellant. Individual appeals may be consolidated by order of the Supreme Court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the respondent. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the Supreme Court. In original proceedings in the Supreme Court the party making the original application shall be known as the plaintiff and any other party as the defendant.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall name the court from which the appeal is taken; and shall designate that the appeal is taken to the Supreme Court.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at his last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any separate or joint notice of appeal in a civil case, the party taking the appeal shall pay to the clerk of the district court such filing fees as are established by law, and also the fee for docketing the appeal in the Supreme Court. The clerk of the district court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the district court shall forthwith transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the Supreme Court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the Supreme Court shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, such name shall be added to the title.

RULES OF THE UTAH SUPREME COURT

Rule 4

Rule 4. Appeal as of right: When taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; provided however, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the district court by any party: (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the district court by any party: (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the district court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in Paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment or order but before the entry of the judgment or order of the district court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by Paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Paragraph (a) of this rule. Any such motion which is filed before expiration of the prescribed time may be ex parte unless the district court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with the district court rules of practice. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

LAWS OF UTAH, 1831, pg. 290

Senate Joint Resolution No. 5.

(Passed March 12, 1931.)

CONSTITUTIONAL AMENDMENT RELATING TO MUNICIPAL CORPORATIONS.

A joint Resolution proposing an amendment to Section 5, of Article XI of the constitution of the State of Utah, relating to municipal corporations.

Be it resolved by the Legislature of the State of Utah, two-thirds of all the members elected to each of the two houses voting in favor thereof:

SECTION 1. **Section proposed to be amended.** That it is proposed to amend section 5, of Article XI of the constitution of the State of Utah, so that the same will read as follows:

Sec. 5. **Municipal corporations created by general laws of legislature —incorporated cities or towns may frame and adopt charter—manner prescribed—charter to be submitted to electors—copies to be distributed—city recorder to file with secretary of State—amendments—powers conferred upon cities.** Corporations for municipal purposes shall not be created by special laws. The legislature by general laws shall provide for the incorporation, organization and classification of cities and towns in proportion to population, which laws may be altered, amended or repealed.

Any incorporated city or town may frame and adopt a charter for its own government in the following manner:

The legislative authority of the city may, by two-thirds vote of its members, and upon petition of qualified electors to the number of fifteen per cent of all votes cast at the next preceding election for the office of the mayor, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election. The ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation. Such candidates shall be nominated in the same manner as required by law for nomination of city officers. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving a majority of the votes cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.

Any charter so framed shall be submitted to the qualified electors of the city at an election to be held at a time to be determined by the charter

commission, which shall be not less than sixty days subsequent to its completion and distribution among the electors and not more than one year from such date. Alternative provisions may also be submitted to be voted upon separately. The commission shall make provisions for the distribution of copies of the proposed charter and of any alternative provisions to the qualified electors of the city, not less than sixty days before the election at which it is voted upon. Such proposed charter and such alternative provisions as are approved by a majority of the electors voting thereon, shall become an organic law of such city at such time as may be fixed therein, and shall supersede any existing charter and all laws affecting the organization and government of such city which are now in conflict therewith. Within thirty days after its approval a copy of such charter as adopted, certified by the mayor and city recorder and authenticated by the seal of such city, shall be made in duplicate and deposited, one in the office of the secretary of State and the other in the office of the city recorder, and thereafter all courts shall take judicial notice of such charter.

Amendments to any such charter may be framed and submitted by a charter commission in the same manner as provided for making of charters, or may be proposed by the legislative authority of the city upon a two-thirds vote thereof, or by petition of qualified electors to a number equal to fifteen per cent of the total vote cast for mayor on the next preceding election, and any such amendment may be submitted at the next regular municipal election, and having been approved by the majority of the electors voting thereon, shall become part of the charter at the time fixed in such amendment and shall be certified and filed as provided in case of charters.

Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law, and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not include the power to regulate public utilities, not municipally owned, if any such regulation of public utilities is provided for by general law, nor be deemed to limit or restrict the power of the legislature in matters relating to State affairs, to enact general laws applicable alike to all cities of the State.

The power to be conferred upon the cities by this section shall include the following:

(a) To levy, assess and collect taxes and borrow money, within the limits prescribed by general law, and to levy and collect special assessments for benefits conferred.

(b) To furnish all local public services; to purchase, hire, construct, own, maintain and operate, or lease, public utilities local in extent and use;

to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

(c) To make local public improvement and to acquire by condemnation, or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over than needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement.

(d) To issue and sell bonds on the security of any such excess property, or of any public utility owned by the city, or of the revenues thereof, or both, including, in the case of a public utility, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility.

Sec. 2. **Duty of secretary of State.** The secretary of State is hereby directed to submit the proposed amendment to the electors of the state at the next general election in the manner provided by law.

Sec. 3. **To take effect.** If adopted by the electors of this State, this amendment shall take effect on January 1st, 1933.

Senate Joint Resolution No. 3.

(Passed March 12, 1931.)

COMMENDING EFFORTS OF AMERICAN LEGISLATORS' ASSOCIATION AND OF THE INTERSTATE LEGISLATIVE REFERENCE BUREAU.

A joint Resolution proposing to commend the efforts of the American legislators' association and of the interstate legislative reference bureau for their efforts to procure promptly for all inquiring State legislators, whatever information or advice they desire in connection with legislative problems, to conduct a systematic study of legislative matters, and to publish for the benefit of all State legislators, the magazine called the "State Government."

WHEREAS, All experienced persons know that in each State, legislative problems continually increase, both in number and in complexity.

WHEREAS, It is obvious that in order to solve such problems most effectively, each legislature must give systematic, scientific and business-

McQUILLIN MUN. CORP, (3rd Ed) §32.02

governing the procedure in condemnation cases. This plan is adopted because the procedure is so different in the several jurisdictions and governed to so large an extent by local statutes and charter provisions, which set forth with more or less detail the exact procedure to be observed, that the rules of procedure in any one state would be of slight value in another state.[1] Matters connected with the law of public improvements and local assessments, or special taxation, including such questions as the right to damages in case of a change of a grade of a street, are treated in later chapters.[2] And the rights of abutting owners as against public service corporations are considered in a subsequent chapter.[3]

[1] In response to concern that has been expressed that injustice may result from the diversity of eminent domain procedures in different states, and the different procedures that may exist even within the same state, the National Conference of Commissioners on Uniform State Laws has drafted the Uniform Eminent Domain Code which is recommended by the Commissioners for adoption in all the states.

[2] See chs 37, 38.

[3] See ch 34.

§ 32.02. Definition and nature of power.

The power of eminent domain is an inherent attribute of the sovereignty of the state,[1] to take or authorize the taking of any private property within its jurisdiction for public use to promote the general welfare, without the consent of the owner,[2] upon payment of a just compensation therefor, according to the method prescribed by law.[3]

The power is essentially legislative,[4] unrestricted,[5] and does not emanate from constitution or statute,[6] but is merely limited thereby.[7] Or, as otherwise expressed: It is older than the constitutions, it requires no constitutional recognition, it is not created or granted by constitution or statute, and is without restriction, except as the people have limited it by organic inhibition, namely, that the taking must be for a public use and that compensation must be made.[8] It is a reserved right attached to every person's land and paramount to a person's right of ownership;[9] therefore, no element of contract is present.[10] It arises from the necessities of government,[11] and is a continuing power, not abrogated by appropriation to one public use.[12]